

LIN (Migration) [2019] AATA 6025 (3 October 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mrs Ling LIN

VISA APPLICANTS: Mr Hongwen Chen
Mr Mobing Chen

CASE NUMBER: 1904023

DIBP REFERENCE(S): BCC2016/1229572

MEMBER: Russell Matheson

DATE: 3 October 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.213 of Schedule 2 to the Regulations; and
- cl.309.222 of Schedule 2 to the Regulations and;
- the second named visa applicant meets:
- cl.309.322 of Schedule 2 to the Regulations.

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Statement made on 03 October 2019 at 1:18pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – Federal Circuit Court remittal – limit on number of people a person can sponsor – review applicant/sponsor’s two previous sponsorships – compelling circumstances – sponsor’s financial circumstances, medical condition and treatment – sponsor would suffer undue financial hardship if she had to relocate to China – decision under review remitted

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2. **LEGISLATION**

Migration Act 1958 (Cth), ss 65

Migration Regulations 1994 (Cth), r 1.20.J, Schedule 2, cls 309.211(2), 309.213, 309.221, 309.222, 309.322

CASES

Babicci v MIMIA [2004] FCA 1645

Babicci v MIMIA [2005] FCAFC 77

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STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Immigration on 16 March 2017 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958*.
4. The first named visa applicant (the applicant) applied for the visa on 20 March 2016 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
5. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.309.222 because the sponsorship was not approved by the minister. The reason for this was that the sponsor did not meet the requirements in r.1.20J and the delegate was not satisfied that there were compelling circumstances affecting the sponsor so that the sponsorship should be approved.
6. The matter before the Tribunal has been remitted by the Federal Circuit Court of Australia on 19 February 2019 because the previous decision to affirm the visa application by the Tribunal on 19 October 2018 was affected by jurisdictional error because the Tribunal failed to consider the applicant's claim that her financial circumstances constituted a compelling reason affecting her.
7. The review applicant appeared before the Tribunal on 19 September 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant and two witnesses Mrs Katherine Li and Mrs Nan Li friends of the sponsor.
8. The review applicant was represented in relation to the review by her registered migration agent.
9. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.
10. **Background**
11. The applicant is a 48 year-old male citizen of China. He was previously married and divorced his wife in 2005. There are two children of that relationship, the second of whom is the second named visa applicant and is currently 25 years old. The applicant entered Australia on 16 March 2008 holding a Subclass 676 Tourist visa. That visa expired and he remained in Australia. He was granted a Bridging visa while another application was assessed. That application was refused and the applicant remained in Australia as an unlawful non-citizen. He was located by the Department and placed in immigration detention. He was returned to China on 14 April 2015.
12. The sponsor is a 53 year-old female who was born in China. She is an Australian citizen. She first entered Australia in December 1991 sponsored by her then husband Mr A. There is a child of that relationship who resides in Australia.

13. The sponsor divorced her first husband in 1998. In 2004 she married Mr B who she sponsored for a Partner visa which was granted to him. She divorced Mr B in August 2010. There are no children of that relationship.
14. The sponsor then married Mr C in December 2010 who she sponsored for a Partner visa which was granted to him. She divorced Mr C in July 2015.
15. The parties claimed that they met each other on 20 December 2014 while the applicant was in Australia. The parties claimed that they committed to a relationship with each other on 14 February 2015. The applicant then returned to China in April 2015. The sponsor travelled to China for two weeks in September 2015 and again for a month in December 2015. The parties were married in China on 30 December 2015. Since their marriage the sponsor has travelled to China on numerous occasions to visit the applicant, the most recent period being from 14 December 2018 to 16 January 2019.

CONSIDERATION OF CLAIMS AND EVIDENCE

16. The Tribunal has before it the Department's file relating to the applicant; its own file; and a copy of the Department decision provided by the sponsor to the Tribunal.

17. Issue

18. The issue in the present case is whether there are compelling circumstances affecting the sponsor such that the sponsorship should be approved.

19. Hearing

20. The sponsor gave evidence as to her current circumstances including living arrangements, past work history, health issues, finances and the sponsor's son (secondary applicant). The sponsor stated that the applicant's son is not studying at present is currently on a bridging visa and is allowed to work 20 hours a week and he is doing odd jobs. She also provided details of the applicant's life in China including living arrangements, work and income. The applicant and sponsor told the Tribunal they have little savings with the sponsor being on Centrelink payments and the applicant stating that he earns RMB10, 000 per annum working as a farmer. The two witnesses provided evidence to the Tribunal and both had a sound knowledge of the parties' relationship, the sponsor's health and the parties' financial circumstances. The Tribunal found the two witnesses genuine and believable.
21. The Tribunal referred to the fact that the sponsor was born in China and she could renounce her Australian citizenship and return to live in China permanently as a Chinese citizen with access to Chinese health services with the applicant if she chose to do so. The sponsor stated that she is an Australian citizen and does not want to return to live in China. She said that she suffers from a serious heart condition that is gradually deteriorating and it would be a financial burden upon her in relation to the costs of her medications which are subsidised in Australia and they would not be subsidised in China and she would lose the only income that she receives from Centrelink. The sponsor further stated that she lives with her son who works as a plumber and they have a joint \$700,000 mortgage on a property together and that her son's wages are exhausted by paying the bills, mortgage and spent on daily living expenses and she spends a significant amount of her Centrelink payments on her medication. The sponsor provided in her written submission dated 17 September 2019 to the Tribunal a table of the associated costs in relation to her medication (TF folios 36 and 37).

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24. Other issues

25. The sponsor addresses a number of issues in regard to relocation to China in her written submission dated 17 September 2019. The sponsor submits that it is feasible for her to abandon her Australian citizenship and resume her Chinese citizenship if she had to resettle in China in order to maintain her married relationship with the applicant. She further states that this will not prevent her from facing the significant financial burden of paying exorbitant fees associated with medical treatment for her heart disease and for counselling with mental health clinicians and psychologists with no income and no work prospects due to her condition and no other means of financial support. The sponsor provided a medical report from the Second Affiliated Hospital of Hainan Medical University confirming the costs of surgical intervention in China for the sponsor's condition would be approximately \$20, 500. The sponsor further submits that she has no savings and has been receiving a newstart allowance for many years and this would cease upon leaving Australia and the costs for prospective heart surgery would place an enormous financial burden upon her. The sponsor further submits that she has purchased a property with her son from her first marriage and they both have a commitment to making a financial contribution to the repayment of their mortgage. The sponsor provided evidence that this would also cause undue financial burden to herself and her son if she had to forgo her main source of income.
26. The applicant gave evidence that he had concerns for the sponsor's wellbeing and access to treatment for her illness if she relocated to China to live with him. He further stated that the sponsor was unable to receive prompt medical care if it was required and this would put her life at risk because they lived a long distance from the nearest hospital and it would take an ambulance nearly 40 minutes to reach them. The sponsor provided evidence to the Tribunal that she has been constantly taken to hospital for treatment in Australia by ambulance because of her worsening illness. The sponsor in her written submission states that relocation in China nearer to a hospital is not possible due to the stringent residential registration system (Hukou) which is consistent with DFAT thematic report on China, published on 21 December 2017 which states:

27. "There are many opportunities for internal relocation in China and movement of people is fundamental to China's push for continued economic growth and urbanisation. While there are no legal impediments to internal migration, the Hukou system presents the biggest administrative impediment to freedom of internal movement"

Are the sponsorship requirements met?

28. Clause 309.213 requires that the applicant is sponsored by the review applicant, where such person has turned 18; or where they have not, by the review applicant's parent or guardian who has turned 18 and is either an Australian citizen, permanent resident or eligible New Zealand citizen (as defined in r.1.03 of the Regulations).
29. At the time of decision, this sponsorship must have been approved and still be in force cl.309.222.
30. Approval of sponsorship is subject to limitations contained in r.1.20J of the Regulations which sets a limit on the number of people that a person can sponsor in a lifetime and a minimum time that must have lapsed between each sponsorship.
31. Evidence before the Tribunal and as provided at the Tribunal hearing is that the sponsor previously sponsored two other persons for partner visas and the visas were granted.
32. It is not disputed that the review applicant does not meet the sponsorship requirements in r.1.20J(1). The review applicant has previously sponsored two visa applicants for the

grant of Partner visas. It is claimed that shortly after those visa applicants were granted the right to reside permanently in Australia the review applicant's relationship with them ended and she subsequently divorced those husbands. As the review applicant has previously sponsored more than one other person for the grant of a Partner visa she does not meet the requirements of r.1.20J(1) and, if the sponsorship is to be approved the Tribunal must be satisfied that there are compelling circumstances affecting the sponsor.

33. The Tribunal finds that the limitation in r.1.20J applies because two other persons were granted relevant permissions as the partner of the sponsor on the basis of a sponsorship or nomination by the sponsor. The Tribunal, on the evidence, finds that the sponsorship limitation applies in the present case to preclude approval of the sponsorship unless the Tribunal is satisfied that there are compelling circumstances affecting the sponsor.
34. Clauses 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.

35. Are there compelling circumstances affecting the sponsor?

36. The expression 'compelling circumstances' is not defined in the legislation. Whether there are compelling circumstances affecting the sponsor is a matter of fact and degree for the Tribunal to determine. The Tribunal must consider whether the circumstances are such that they evoke interest or attention in a powerfully irresistible way: *Babicci v MIMIA* [2004] FCA 1645 or are 'so powerful that they lead the [Tribunal] to make a positive finding that the [provision] should be waived': *Babicci v MIMIA* [2005] FCAFC 77.
37. The previous Tribunal's decision on 19 October 2018 was affected by jurisdictional error because the Tribunal failed to consider the applicant's claim that her financial circumstances constituted a compelling reason affecting her. The Tribunal has not, for the purposes of this decision, like the previous Tribunal, made a full assessment of whether the parties are in a genuine and continuing relationship. It is a requirement for the grant of the visa that the parties be in a genuine and continuing relationship. As the sponsorship requirements are in addition to the parties meeting this requirement, the mere fact the parties may be in an exclusive and genuine and continuing relationship of itself does not provide compelling circumstances affecting the sponsor for approval of the sponsorship otherwise the sponsorship limitation is meaningless. The Tribunal has, however, taken into account all the particular circumstances of the claimed relationship.
38. Various statements have been provided by witnesses claiming the relationship is genuine, and the review applicant was supported by a number of witnesses at the previous hearing and two witnesses at this review. The information, however, does not indicate that there are any characteristics of the relationship that would indicate that the relationship is anything other than would be expected in a genuine relationship. The Tribunal is not satisfied, taking into account all the aspects of the relationship, that it provides a compelling circumstance affecting the sponsor so that the sponsorship should be approved.
39. The Tribunal has considered whether the sponsor is unable to receive prompt medical care if it was required and that this would put her life at risk because they lived a long distance from the nearest hospital and it would take an ambulance nearly 40 minutes to reach them and whether that relocation in China nearer to a hospital is not possible due to the Hukou system, are compelling circumstances affecting the sponsor and the sponsorship can be approved despite the operation of r.1.20J(1). The Tribunal accepts that it would be a risk for

the sponsor to live a significant distance from a hospital if she relocated to live in China but believes this would be calculated risk made by choice. There is little evidence before the Tribunal to demonstrate that she would be unable to receive proper care and treatment if required. The Tribunal finds that the applicant could receive proper care and treatment if required. The Tribunal also accepts that the relocation closer to a hospital or medical services in China may be improbable due to the stringent residential system in China. The Tribunal is not satisfied that these circumstances individually or cumulatively provide a compelling circumstance affecting the sponsor such that the sponsorship should be approved.

40. The Tribunal has considered the applicant's claim that her financial circumstances constituted a compelling reason affecting her such that the sponsorship should be approved. The sponsor provided oral evidence and a detailed written submission in relation to her financial circumstances and the financial hardship she would incur if she had to relocate to China to live with the applicant.
41. The Tribunal has considered the sponsor's evidence that she would suffer significant financial burden due to paying the exorbitant fees associated with medical treatments of her heart disease and for counselling with mental health clinicians and psychologists and the high cost of medication and surgery in China and that she would lose her subsidised payments for medication and health care she currently receives in Australia. The Tribunal has also considered other claimed financial hardship such as, mortgage payments towards a \$700,000 loan with no income and no work prospects due to her condition, the limited financial support available from the applicant and immediate family and the fact she has no savings.
42. Based on the evidence provided the Tribunal is satisfied the sponsor would suffer undue financial hardship in regard to the costs of treatment for her illness if she had to relocate to live in China and provides a compelling circumstance affecting the sponsor such that the sponsorship should be approved.

43. **FINDINGS**

44. When making the application, the applicant was sponsored by the sponsor, who completed the relevant sponsorship form. The sponsor was born in 1971 and was over the age of 18 at the time when the application was made. The Tribunal finds that the applicant was sponsored by the sponsor who is an Australian citizen, who claimed to be the spouse of the applicant and who had turned 18.
45. Regulation 1.20J(2) provides that the Tribunal may approve the sponsorship, despite the limitation, if satisfied that there are 'compelling circumstances affecting the sponsor'. Having regard to the parties' circumstances individually and as a whole and to the sponsor's credible oral and extensive documentary evidence provided at the Tribunal hearing; the Tribunal is satisfied that the undue financial hardship the sponsor would suffer would be inappropriate because it would be excessive and disproportionate to the costs the sponsor currently incurs to treat her medical condition in Australia than it would be in China provides a compelling circumstance affecting the sponsor such that the sponsorship should be approved despite the operation of r.1.20J(1).
46. There is no evidence before the Tribunal that r.1.20J, r.1.20KA or r.1.20KB prevents approval of the sponsorship.

47. On the evidence before the Tribunal the requirements of cl.309.213 and cl.309.222 are met. Additionally, the requirements of cl.309.322 are met by the second named applicant.
48. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

49. The Tribunal remits the application for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.213 of Schedule 2 to the Regulations; and
 - cl.309.222 of Schedule 2 to the Regulations; and
 - the second named visa applicant meets:
 - cl.309.322 of Schedule 2 to the Regulations
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Russell Matheson
Member